

Trusts and Succession (Scotland) Bill

Islands Communities Impact Assessment (ICIA)

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Step one – Develop a clear understanding of your objectives

What are the objectives of the policy, strategy or service?

A significant number of the recommendations deal with the powers and duties of trustees. The Trusts (Scotland) Act 1921 (“the 1921 Act”) sets out a number of statutory powers and duties of trustees that form part of every trust unless the contrary is provided for in the trust deed.

Most of the current statutory law relating to trusts is found in the 1921 Act. Not only is its structure and wording old-fashioned, it has been heavily amended so that it is not easy for truster, trustees or beneficiaries to understand what their legal rights and duties are. In modern trust practice, the powers and duties of trustees are markedly different from those in the 1921 Act. The Bill, therefore, will bring the powers and duties laid out in statute more into line with modern practice.

The overall policy aim of the Bill is to ensure that the Scots law of trusts is clear and coherent and able to respond appropriately to modern conditions and commercial requirements. This will be achieved by bringing together existing trusts legislation into a single statute and updating it into modern statutory language.

A significant number of provisions contained in the Bill deal with the powers and duties of trustees. A summary of some of these recommended reforms are as follows:

- replaces the common law grounds for the removal of trustees with new statutory provisions that provide a trustee may be removed by the court, co-trustees or beneficiaries in relevant circumstances;
- restates the statutory provisions that govern the appointment, resignation, removal and discharge of trustees and decision-making by trustees;
- introduces a scheme to clarify the law on the duty of trustees to provide information to beneficiaries and others;
- clarifies the law on trustee delegation and nominees;
- replaces the statutory and common law power of the court to authorise advances of capital with a new provision by which trustees have power to advance up to the whole of a beneficiary’s prospective share in the capital or income of the trust fund in relevant circumstances;
- creates a new statutory power to allow for the removal of ex officio trustees from trust deeds;
- provides a default provision that confers on trustees in their dealings with the trust property power to exercise all of the powers of administration and management that a natural person of full age and capacity would have in respect of his or her own property;

- confer on courts a new power to appoint new trustees, grant additional administrative and managerial powers in relation to the trust property on trustees, remedy defects in the exercise of trustees' fiduciary powers, and alter trust purposes to take account of a material change of circumstances that has occurred since the trust was set up, normally only exercisable once 25 years has elapsed since the creation of the trust;
- clarifies the law on breach of trust;
- expressly provides for private purpose trusts (non-charitable and non-public trusts that do not have defined persons as beneficiaries but rather exist to achieve defined purposes, frequently of a philanthropic or business nature); and,
- reforming the powers of the courts to create a comprehensive set of remedies that deal with problems in the administration of trusts, for the liability of trustees in the expenses of litigation, and restates and improves the legislation governing applications for the variation of trust purposes.

The one substantive provision on the Scots law of intestate succession implements a recommendation from the SLC's Report on Succession (2009) and was consulted on by the Scottish Government in 2015. The law on intestate succession provides a default position in cases where an individual dies without leaving a will. A statutory scheme for intestacy provides a default set of rules about what should happen to someone's estate when they die without a will. The substantive provision of succession law in this Bill will amend the order of intestate succession so that a surviving spouse/civil partner's entitlement to the whole of the net intestate estate will rank second in line behind any surviving children of the deceased; this change reflects the contemporary perception of a spouse or civil partner as a key member of the deceased's family.

Do you need to consult?

No public consultation was carried out by the Scottish Government, however, extensive consultation of the law and reforms proposals was undertaken by the Scottish Law Commission, resulting in its Report on Trust Law published in 2014.

The SLC first examined, jointly with the Law Commission for England and Wales, trustees' powers of investment in the late 1990s. This resulted in a Joint Report, Trustees' Powers and Duties (LC No 260; SLC No 172, 1999). Thereafter, the SLC has issued eight further Discussion Papers. They are as follows:

- Breach of Trust (DP No 123, 2003)
- Apportionment of Trust Receipts (DP No 124, 2003)
- Trustees and Trust Administration (DP No 126, 2004)
- Variation and Termination of Trusts (DP No 129, 2005)
- Nature and Constitution of Trusts (DP No 133, 2006)
- Liability of Trustees to Third Parties (DP No 138, 2008)
- Accumulation of Income and Lifetime of Private Trusts (DP No 142, 2010)
- Supplementary and Miscellaneous Issues relating to Trust Law (DP No 148, 2011)

In addition, two Consultation Papers have been published:

- Defects in the Exercise of Fiduciary Powers (2011)

- Public and Charitable Trusts: Amalgamation of Functions and Common Investment Funds (2012)

Alongside, one Report:

- Variation and Termination of Trusts (SLC No 206, 2007)

Responses have been overwhelmingly in favour of reform of Scots trust law.

How are islands identified for the purpose of the policy, strategy or service?

The islands have not been specifically identified for the policy and we do not anticipate that the Bill provisions will differentially affect those who live on the islands compared to those who live on the mainland.

What are the intended impacts/outcomes and how do these potentially differ in the islands?

The overall policy aim of the Bill is to ensure that the Scots law of trusts is clear and coherent and able to respond appropriately to modern conditions and commercial requirements.

The Bill affects those who choose to set up or administer a trust or who are beneficiaries under a trust and applies equally to those who live on an island or on the mainland. Conversely, for those not wishing to be involved with a trust, there is a range of other legal devices which may be considered and which remain unaffected by this Bill.

Is the policy, strategy or service new?

Yes - this is a new policy. The overall policy aim of the Bill is to ensure that the Scots law of trusts is clear and coherent and able to respond appropriately to modern conditions and commercial requirements. This will be achieved by bringing together existing trusts legislation into a single statute, reforming and updating it into modern statutory language.

Step two – Gather your data and identify your stakeholders

What data is available about the current situation in the islands?

The trust is extremely important to Scotland. Whilst it is impossible to give a figure for the total number of trusts in Scotland, some figures are available.

The Trusts Registration Service had 198,000 trusts and estates registered up to 31 March 2022.¹ This includes taxable and non-taxable trusts, unless it is an excluded express trust. Using population estimates, this represents one trust for every approximately 339 inhabitants.² On the assumption that the number in Scotland is proportionate and using population estimates for mid-2020,³ that means there would be approximately 16,123 trusts in Scotland.

The total Income Tax and Capital Gains Tax payable on UK-wide trusts and estates in the tax year ending 2021 was £1,455 million, increasing by around 5% from the previous tax year; the total income and chargeable gains of all trusts and estates in the same tax year was £6,510 million, an increase of around 7% from the previous tax year.⁴

It is not possible to further disaggregate the number of trusts by geographic location.

Do you need to consult?

No. We do not see a need to establish the impact of this new policy on islands. It is a legal institution which any natural or legal person can utilise. There is no compulsion to use a trust and for those not wishing to do so there are a range of alternative legal devices which may be considered and which remain unaffected by this Bill.

How does any existing data differ between islands?

Given the above mentioned difficulties obtaining data, we do not consider this question relevant.

Are there any existing design features or mitigations in place?

The policy is no different between the island community and the rest of Scotland. It will be up to individuals/businesses on whether they wish to raise finance by using the new registers which will make it easier and cheaper to do so.

¹These can be accessed at <https://www.gov.uk/government/statistics/trust-statistics/trusts-statistics-october-2021--2>

² These can be accessed at <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/populationestimatesforukenglandandwalescotlandandnorthernireland>

³ These can be accessed at <https://www.nrscotland.gov.uk/files/statistics/population-estimates/mid-20/mid-year-pop-est-20-report.pdf>

⁴ Changes in trust income and taxation for the tax year ending 2021 may have been affected by the economic impacts of the COVID-19 pandemic, therefore a larger degree of change may be observed for this tax year compared to previous years.

Step three - Consultation

Who do you need to consult with?

N/A

How will you carry out your consultation and in what timescales?

N/A

What questions will you ask when considering how to address island realities?

N/A

What information has already been gathered through consultations

N/A

What concerns have been raised previously by island communities?

N/A

Is your consultation robust and meaningful and sufficient to comply with the Section 7 duty?

N/A

Step four - Assessment

Does your assessment identify any unique impacts on island communities?

No. We do not anticipate that any impact on island communities will be different from the impact of communities on the mainland.

Does your assessment identify any potential barriers or wider impacts?

We do not consider there to be any potential barriers.

How will you address these?

N/A

Given the foregoing, in our opinion, we do not consider that this Bill will have an effect on an island community which is significantly different from its effect on other communities (including other island communities).

In preparing the ICIA, I have formed an opinion that our policy, strategy or service is **NOT** likely to have an effect on an island community which is significantly different from its effect on other communities (including other island communities).

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